Supreme Court of the United States

October Term, 1967

No. [redacted] 823

UNIFORMED SANITATION MEN ASSOCIATION, INC., *et al.*,
Petitioners,

against

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, *et al.*,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Preliminary Statement

Petitioners ask this Court to issue a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, entered on September 20, 1967. That judgment unanimously affirmed a judgment of the United States District Court for the Southern District of New York which dismissed petitioners' complaint for failure to state a claim on which relief can be granted.

Questions Presented

1. May a municipal employee be dismissed for refusing to answer questions concerning the proper performance of his duties on the ground that his answers would tend to incriminate him, or for refusing to sign a waiver of immunity from prosecution when called to testify about his employment by a grand jury, and then failing to explain or justify his action at a hearing where he was given full opportunity to do so?

2. Were petitioners' dismissals rendered unlawful because the City Commissioner of Investigation, pursuant to court order, intercepted and recorded telephone conversations over a telephone leased by the City to which conversations certain of the petitioners were parties, even though no evidence derived from the interceptions was offered against the petitioners in any subsequent proceeding?

The Facts

The material facts are not in dispute Petitioners were formerly employees of the New York City Department of Sanitation assigned to the Marine Transfer Station at 91st Street and the East River in Manhattan. In the fall of 1966 the City Commissioner of Investigation learned that Sanitation Department employees were failing to charge private cartmen proper fees for the use of City facilities at the Marine Transfer Station. Instead, the employees were diverting fees to their own use resulting in a loss of income to the City of hundreds of thousands of dollars (R. 5a, 71a-72a).*

* References designated "R." refer to the Joint Appendix in the Court of Appeals.

In the course of his investigation, the Commissioner obtained authorization from Supreme Court, New York County, under the provisions of Section 813-a of New York Code of Criminal Procedure, to tap a telephone (AT 9-7935) leased by the Department of Sanitation for the transfer of official business at the Marine Transfer Station. This official City telephone was the only line tapped in the investigation (R. 72a).

In November, 1966, the Commissioner or his deputy questioned petitioners concerning their duties and employment (R. 41a-65a). Prior to being questioned they were advised of their right to counsel, their right to remain silent and not be compelled to be a witness against themselves, and that anything they said could be used against them. They were also apprised of the provisions of Section 1123 of the New York City Charter concerning dismissal where a City employee fails to testify concerning the property, government or affairs of the City on the ground that his answer would tend to incriminate him (R. 73a-74a). Twelve of the petitioners refused to answer claiming the constitutional privilege against self-incrimination. Three of the petitioners were interrogated and gave answers without claiming the privilege against self-incrimination (R. 6a).

On December 2, 1966, the Commissioner of Sanitation suspended the petitioners. Those who had refused to testify on the basis that their answers would tend to incriminate them were advised that their suspensions were based on Section 1123 of the City Charter. The others were advised that their suspensions were based on information received from the Commissioner of Investigation concern-

ing irregularities arising out of their employment (R. 7a, 45a, 53a).

On December 14, 1966, petitioners commenced this action for declaratory judgment and injunctive relief. As of that date petitioners had been suspended but not dismissed from their employment. Subsequently, on December 16, 1966, the Commissioner of Sanitation issued formal charges under Section 75 of the New York Civil Service Law against the twelve petitioners who had refused to answer questions put to them by the Commissioner of Investigation or his deputy. At the time of argument before the District Court no hearings had been held on these charges (3a, 56a-70a).

After argument of the case in the District Court but prior to the argument in the Second Circuit Court of Appeals the following relevant events occurred.

Hearings were held on the charges made against the twelve employees who invoked the privilege against self-incrimination in their appearance before the Commissioner of Investigation. The only evidence offered against them was the transcript of proceedings before the Commissioner of Investigation. Petitioners were represented at the disciplinary proceedings by the same counsel who appeared for them in the District Court and on their appeal. No transcripts, recordings or other evidence obtained through a wiretap were offered against petitioners or received in evidence during the disciplinary proceedings.

The three petitioners who did not assert the privilege against self-incrimination when called before the Commis-

sioner of Investigation were later summoned to appear before a grand jury and asked to sign waivers of immunity. Each of them refused to sign a waiver. Subsequently, they were served with amended charges by the Commissioner of Sanitation to the effect that they had violated Section 1123 of the New York City Charter by their refusal to waive immunity before the grand jury.

In the hearings conducted in the Department of Sanitation the charges against those three petitioners related solely to their refusal to waive immunity before the grand jury. No evidence or testimony of any kind based upon a wiretap was offered against them.

At the disciplinary proceedings petitioners offered no testimony to explain their refusal to answer questions put to them by the Commissioner of Investigation or his deputy or their refusal to sign waivers of immunity. Their defense rested solely on claims of unconstitutionality or illegality in the proceedings.

Each of the petitioners was dismissed after the hearings for violations of Section 1123 of the New York City Charter.

Opinions Below

The District Court on respondents' motion dismissed the complaint on grounds of abstention. Subsequent to the District Court decision the New York State Court of Appeals decided *Gardner* v. *Broderick*, 20 N Y 2d 227 (1967), which authoritatively construed Section 1123 of the New York City Charter. The Second Circuit Court of Appeals noted that this construction removed the federal abstention

question from the case and proceeded to consider the merits. In its opinion, the Circuit Court held "there was no invasion of appellants' constitutional rights when they were dismissed from their employment for refusing to answer questions as to their conduct of their jobs." That Court also held that there had been no "trespassory intrusion into private, constitutionally protected premises" as was found to exist by this Court in *Berger* v. *New York,* 388 U. S. 41 (1967). The Circuit Court stated:

> "We also hold that appellants' claim based on the Commissioner's wiretap was properly dismissed. No violation of the Federal Communications Act, 47 USC §605 • • • or deprivation of rights under the Fourth Amendment has been established."

POINT I

As applied in New York, in administrative practice and through judicial interpretation, Charter §1123 meets the constitutional requirements of due process expressed by this Court in *Slochower* v. *Board of Education.*

In *Slochower* v. *Board of Education,* 350 U. S. 551 (1956), this Court was called upon to review a dismissal pursuant to §903 of the New York City Charter (predecessor to the present §1123). Slochower, a Brooklyn College professor, was summarily dismissed pursuant to §903 for failing to answer questions concerning his membership in the Communist Party before a Senate Subcommittee on Internal Security. This Court overruled the holding of the New York Court of Appeals that under §903 an assertion

of the privilege against self-incrimination in defiance of the Charter provision is equivalent to a resignation, saying:

> "It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at 'the property, affairs or government of the city, or * * * official conduct of city employees.' * * *
>
> "The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with the real interest of the State. But there has been no such inquiry here. We hold that the summary dismissal of appellant violates due process of law." (at pp. 558-559).

Subsequent to *Slochower* this Court has held that state statutes authorizing the dismissal of public employees who fail to answer questions in an investigation of matters of legitimate concern to the state or agency involved, do not violate due process where a hearing is held prior to dismissal. *Lerner* v. *Casey*, 357 U. S. 468 (1958); *Beilan* v. *Bd. of Ed. of Phila.*, 357 U. S. 399 (1959); *Nelson, et al.* v. *County of Los Angeles*, 362 U. S. 1 (1960). In each of these cases, appellant was dismissed pursuant to the relevant statute, after a hearing before an appropriate administrative body at which time he was given the opportunity to explain his refusal to testify. The ultimate dismissal in each instance was based, not on the mere refusal to testify, but on the breach of a legitimate condition of employment that the refusal reflected.

Since the *Slochower* decision, the New York Courts have made the implied constitutional guarantee of "proper inquiry" an integral part of the disciplinary procedure whenever §1123 is invoked against a public employee. In *Gardner* v. *Murphy,* 46 Misc. 2d 728 (Sup. Ct., N.Y. Co., 1965), the court reviewed this Court's decisions which recognized both the interest of the government in the loyalty of its employees and the need to protect the constitutional rights of those employees, and found:

> "Logic thus dictates the post-*Malloy* v. *Hogan* (378 U. S. 1) applicability to State proceedings of the doctrine enunciated in *Slochower* v. *Board of Educ.* (350 U. S. 551); Automatic dismissal from public employment predicated *solely* upon one's invocation of the Fifth Amendment privilege against self-incrimination is proscribed by the United States Constitution * * *." (46 Misc. 2d at p. 734).
>
> * * *
>
> "If the mere statement of present refusal to waive one's Fifth Amendment rights is interpreted as a prima facie rather than a conclusive basis for discharge, the subject provisions are not repugnant to constitutional mandates as mirrored by the United States Supreme Court pronouncements." (*Ibid.,* at p. 736).

The New York courts consider notice and a hearing in proceedings under §1123 as not merely a *pro forma* requirement, but as a substantive administrative remedy afforded petitioners in this case. This reflects the concern expressed by the Court in *Slochower,* that absent such a hearing:

> "No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege." 350 U. S. at 558.

The recent decision of the New York Court of Appeals in *Gardner* v. *Broderick*, 20 N Y 2d 227 (1967) would appear to have ended any uncertainty as to the New York Court of Appeals' interpretation of §1123.

Petitioner Gardner, a policeman, had, in the course of an investigation of accusations of bribery and corruption of police officers, refused to waive immunity from prosecution and asserted his Fifth Amendment privilege against self-incrimination. He was given an administrative hearing at which time he was afforded an opportunity to explain his silence. Upon refusing to do so, he was dismissed.

In upholding the dismissal, the Court of Appeals cited *Nelson* v. *County of Los Angeles*, 362 U. S. 1 (1960), in sustaining statutes such as §1123 where the plaintiff was not deprived of due process and when the information sought concerned the performance of his duties as a public employee. A challenge to the constitutionality of §1123 after *Gardner* no longer presents a substantial federal question.

Petitioners persist in contending that the City has dismissed them merely for exercising their constitutional right to remain silent. In support of this contention they cite two recent decisions of this Court, *Garrity* v. *New Jersey*, 385 U. S. 493 (1967) and *Spevack* v. *Klein*, 385 U. S. 511 (1967). As to *Garrity*, the Circuit Court below noted that

its "holding has no application to the present case where the employees did not testify, but relied upon their claims of privilege". *Garrity* held only that where testimony was given by public employees under circumstances where failure to testify could lead to dismissal, their testimony could not be used against them in subsequent criminal prosecutions.

As to the effect of the decision in *Spevack*, which involved the disbarment of an attorney, this Court noted that it did not reach the question of the discharge of a public employee who refused to testify in disciplinary proceedings (see fn. 3, 385 U. S. at p. 516). The distinction between *Spevack* and the present case is made clear by Mr. Justice Fortas in his concurring opinion. He stated (385 U. S. at p. 519):

> "I would distinguish between a lawyer's right to remain silent and that of a public employee who is asked questions specifically, directly and narrowly relating to the performance of his official duties as distinguished from his beliefs on other matters that are not within the scope of the specific duties which he undertook faithfully to perform as part of his employment by the State. This Court has never held, for example, that a policeman may not be discharged for refusal in disciplinary proceedings to testify as to his conduct as a police officer."

Despite the obvious legitimate interest of the City in the fitness of its employees to perform their duties and the need for employees to cooperate in an official inquiry on this question, petitioners claim the right (1) to refuse to

answer questions concerning their employment put to them by properly authorized City officials or to refuse to sign a waiver of immunity when called to testify before a grand jury, (2) to refuse to offer any explanation or justification for such refusal at a hearing especially called for that purpose, and (3) to retain their City employment. This is not the law.

In its opinion below the Court of Appeals stated (Appendix B to petition, p. 12a):

> "It was surely proper for a city official charged with the duty to do so to investigate charges of misfeasance in the operation of the Sanitation Department and in connection with such an investigation to question employees about their participation in activity which reflected the possibility of bribery and embezzlement. Can there be any reasonable doubt that an employee, especially one who has been warned of the consequences of his refusal to answer, can be (and, indeed, should be) discharged for such refusal?"

A City employee has the right to refuse to answer when questioned about his employment by appropriate City officials but he does not have a right to fail to explain or justify his refusal at a hearing called to afford him that opportunity and at the same time retain his job. Petitioners were lawfully dismissed.

POINT II

The Commissioner of Investigation did not intrude into a constitutionally protected area in placing a wiretap on a City telephone.

Petitioners contend that the wiretap used by the Commissioner of Investigation violated their rights under §605 of the Federal Communications Act and under the Fourth and Fourteenth Amendments.

The question of whether the Commissioner violated §605 does not present a justiciable issue since neither an affirmative nor a negative answer would be dispositive of any of the issues now before this Court.

Neither the tapped conversations nor any evidence obtained through them was ever used against petitioners in their disciplinary hearing or in any subsequent proceeding. Their dismissals were based on their refusal to answer questions relating to their duties or on their refusal to waive immunity from prosecution when called before the grand jury and not on wiretap evidence.

However, even if the Court were to determine that the tap did violate §605, the introduction of such evidence is permitted in state proceedings under the doctrine of *Schwartz* v. *Texas*, 344 U. S. 199 (1952). This Court has rejected the argument that *Mapp* v. *Ohio*, 367 U. S. 643 (1961), which required the exclusion of evidence obtained in violation of the Fourth Amendment in state as well as federal courts, overruled *Schwartz*, with the result that evidence obtained in violation of §605 should also be ex-

cluded from state proceedings. In *Pugach* v. *Dollinger*, 365 U. S. 458 (1961), this Court reaffirmed the *Schwartz* doctrine, indicating that the federal prohibition against the use of wiretap evidence is not constitutionally required and may be overridden by a state policy permitting the use of such evidence in state courts. Thus, finding a violation of §605 alone does not sustain petitioners' claims.

The dispositive issue is whether respondents violated petitioners' Fourth Amendment rights by the wiretap. This question should be answered in the negative.

It is the constitutional and legislative policy in New York to permit police officials and district attorneys to tap telephone wires, subject to the requirement of a court order authorizing such taps. Constitution Art 1, §12; Code of Criminal Procedure, §813-a. The decision in *Berger* v. *New York*, 388 U. S. 41 (1967) does not set aside this policy. Rather, it describes the constitutional framework in which it can be pursued. As the Court below noted (Appendix B to petition, p. 14a):

> "In our view the recent decision of the Supreme Court in *Berger* v. *New York*, 388 U. S. 41 (1967), has no bearing on the present case. In the *Berger* case 'trespassory intrusions into private, constitutionally protected premises' were claimed. The protection of privacy is not involved in our case where the conversations overheard were carried on in the course of the city's business over a telephone leased by the city for the purpose of such official use.
>
> In *Berger* the Court held that the procedure prescribed by §813-a of the New York Code of Criminal Procedure was constitutionally insufficient, under the

circumstances there presented, to justify the use in criminal proceedings of the evidence secured by eavesdropping."

Assuming that the requirements of the Fourth Amendment apply to some tapped conversations, it is difficult to imagine that a telephone leased by the City, on City-owned premises, tapped by a City official in the course of his investigative duties, is a constitutionally protected area, within the purview of the Fourth Amendment protection as defined by *Berger*.

Under circumstances analogous to the instant case, the Court of Appeals for the Second Circuit, in *United States* v. *Collins*, 349 F. 2d 863, cert. den., 383 U. S. 960 (1965), declined to find an invasion of privacy. It sustained the conviction of a federal employee for mail theft where the primary evidence was obtained by a search of defendant's office desk and jacket. In holding this to be a reasonable search and seizure, the court said (349 F. 2d at pp. 867-868):

"We have no doubt that the search of defendant's work area, including the surface and interior of his desk, conducted by Customs agent McDonnell and Post Office Inspector Forster was a constitutional exercise of the power of the Government as defendant's employer, to supervise and investigate the performance of his duties as a customs employee. Defendant was handling valuable mail for which the Government was responsible. The agents were not investigating a crime unconnected with the performance of defendant's duties as a Customs employee."

The parallel between the logic of this case and the present situation is compelling.

It seems reasonable to ask what constitutional prohibition bars the City from its efforts to determine whether or not its own telephone at one of its established places of business is used during regular business hours by City employees to defraud their employer in connection with their assigned duties at that same location? Equipment of many kinds is placed in the hands of City employees to use in the course of their duties. Some of this equipment in corrupt hands can be converted to improper use. But one rule prevails—this is City equipment to be devoted exclusively to City business. The Commissioner of Investigation has the duty, among others, of investigating the misuse of City property. Petitioners cannot show any legal basis for a claim of immunity from investigation. There is no constitutional right to defraud the City by the use of its own telephone.

The City of course did not invade petitioners' homes or delve into their non-public activities. The investigation was limited to the scope of their activities in connection with their own duties at the Marine Transfer Station operated by the Department of Sanitation. The Fourth Amendment has not been and should not be construed to prevent the City from maintaining adequate supervision and control over its employees and equipment under the circumstances presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, N. Y.,
December 13, 1967.

Respectfully submitted,

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